IN THE

Supreme Court of the United States

October Term, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*

v.

ELMORE & STAHL, *Respondent*

On Writ of Certiorari to the Supreme Court of Texas

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

After a shipper of inanimate perishables by common carrier in interstate commerce has made out a prima facie case of carrier liability, can the carrier exonerate itself without pleading and proving that the damage was due to one or more of the excepted perils recognized at common law and that it did not contribute to such damage by any breach of its contract of carriage?

STATEMENT

In June of 1958, respondent delivered to petitioner at Rio Grande City, Texas, a carload of honeydew melons for which petitioner issued its uniform straight bill of lading which acknowledged receipt of the property in apparent good order. (Pl. Ex. 1, R. 11, 157.)[1] Upon arrival at destination in Chicago, Illinois, the melons were inspected by the United States Department of Agriculture and found to be damaged. The damage consisted of 15% light to dark brown discoloration and 3% decay (Pl. Ex. 5, R. 11, 173).[2] The receiver of the car sold the melons for respondent on a commission basis (Pl. Ex. 4, R. 11, 171) (R. 39).

Respondent filed suit alleging the melons were in good condition at origin and in a damaged condition upon arrival at destination (R. 6-7). In answer to special issues the jury found that respondent had proven such allegations (R. 176).[3]

Correctly recognizing the proof required to successfully defend such an action, petitioner, in answer, alleged:

> A. "That the damage, * * * was the result of the nature of said commodities and the inherent vice thereof, * * *."

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[1] Petitioner's expert witness pointed out that in a shipment of honeydew melons, every melon in the crate is visible and, therefore, any damage can be easily seen without opening the crate (R. 136-137).

[2] Petitioner's statement that the damage averaged approximately 15% was incorrect (Pet. Br. 4, fn. 4).

[3] Petitioner makes no contention that the evidence fails to support the findings of the jury.

B. "That the damage, * * * was the direct result of acts or omissions of plaintiff * * *."

C. That petitioner furnished all services requested by respondent and complied with the terms of the bill of lading and in accordance with the Perishable Protective Tariff. (R. 5)

and the jury found:

A. That the damage was not due solely to an inherent vice (R. 178).[4]

B. That the damage was not the result of acts or omissions of respondent (R. 178).

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[4] Petitioner's argument that the jury's answer to this issue is immaterial and did not constitute a finding that the damage did not result solely from inherent vice is incorrect. (Pet. Br. 5, fn. 4-20 fn. 15). The Supreme Court of Texas interpreted the finding by stating that the jury refused to find that the condition of the melons in Chicago was due solely to inherent vice (R. 238). The authorities cited by petitioner do not hold otherwise (Pet. Br. 5, fn. 6). In 41 B Texas Jurisprudence (1953) on page 780 the author is discussing the importance of not misleading the jury and states:

> "Thus where the jury are asked 'Do you find from a preponderance of the evidence that this condition did not exist etc., Answer 'yes' or 'no', the issue as so framed is calculated to confuse; the answer 'no' does not indicate that the jury affirmatively find that the condition existed, but merely that the party having the burden of proof did not establish the nonexistence of the condition."

Respondent has no quarrel with the rule as stated by petitioner but it does not apply to the inherent vice issue. For an example of a proper application, refer to Issue No. 5 (R. 177). The jury was asked if the worsened condition was **not** in any part caused by the failure of the carrier and instructed to answer "It was due to the failure of the carrier" or "no". (R. 177). By their answer the jury simply said that there was not enough evidence for them to find that the damage was not due to the failure of the carrier. Such negative finding would not support or justify an affirmative finding that the carrier was in fact negligent.

C. That petitioner handled the car in a reasonably prudent manner and in accordance with petitioner's instructions and the bill of lading contract (R. 177).[5]

In its opinion, the Supreme Court of Texas pointed out that "no attack has been made on the jury findings in this case, and petitioner does not say that the damage to the melons was caused by one of the excepted perils mentioned above" (R. 239).

SUMMARY OF ARGUMENT

Respondent contends that when a shipper of perishables in interstate commerce has shown that the condition of the commodity was in worse condition upon arrival at destination than when delivered to carrier at origin,[6] he is entitled to judgment,[7] unless the carrier alleges and proves that the damaged condition was caused by one of the expected perils recognized at common law and that it was not guilty of any breach of contract which contributed to the damage.[8] Petitioner contends, however,

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[5] There is a conflict between Issues No. 3 and No. 4 and Issue No. 5, but since, under respondent's theory of the case, the answers are immaterial, no question on this point has ever been urged by respondent (R. 177).

[6] It is incorrect to say that a shipper must prove good condition at origin and poor condition at destination. Shipper need only show that the merchandise was, when delivered to such carrier, in better condition than it was after receipt at destination. **Ohio Galvanizing & Mfg. Co. v. Southern Pac. Co.**, 39 F.2d 840, 841 (1930 cert. den. 282 U.S. 879).

[7] Shipper has the burden of alleging and proving the amount of his damages.

[8] Carrier's compliance with the contract would include reasonable performance of all matters not covered by the terms and conditions of the bill of lading or shipper's instructions.

that in a perishable case it may exonerate itself merely by establishing freedom from negligence and that it need not establish that the damage falls within one of the excepted perils. This position is contrary to the overwhelming weight of authority in the United States.

The argument of petitioner, made for the first time in this court, that mere proof of the perishability of a commodity and its damage establishes the exception of inherent vice, is not at all well taken (Pet. Br. 2).[9] The fallacy of petitioner's argument is twofold. In the first place, decay is descriptive of a resultant condition for which neither the common law nor the contract of carriage provides an exception from liability. It cannot be equated with a cause of a condition, such as inherent vice, for which an exception is provided.[10] Secondly, while petitioner uses the word "spoilage" throughout its brief, such word is never defined. Respondent submits that the term "spoilage" must necessarily include every conceivable type of damage that could occur to a perishable commodity. If a honeydew melon is cracked, bruised, decayed, discolored, overripe, frozen or otherwise damaged, such melon has become spoiled. The contention of the petitioner, there-

[9] The trial court defined inherent vice to the jury as follows:

"The term 'inherent vice,' as used in this Charge, means any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time." (R. 175).

[10] In **Schnell v. The Vallescura**, 293 U.S. 296 (1934) on pages 305-306 the Court said:

"But the decay of a perishable cargo is not a cause; it is an effect. It may be the result of a number of causes, for some of which, such as the inherent defects of the cargo * * * the carrier is not liable. For others, such as * * * failure to care for the cargo properly during the voyage, he is liable."

fore, if valid, would eliminate any affirmative burden on the part of the carrier to establish that any damage, in any case, resulted from inherent vice.

1. The liability of a carrier for damage to an interstate shipment is a matter of Federal law controlled by Federal statutes and decisions. Section 20(11) of the Interstate Commerce Act makes carriers liable "for the full actual loss, damage or injury * * * caused by" them to property they transport, and declares unlawful and void, any contract, regulation, tariff, or other attempted means of limiting this liability. The act makes no distinction between shipments of inanimate perishable commodities and shipments of inanimate nonperishable commodities. In a recent case, petitioner joined in an amicus brief wherein it was conceded that Section 20(11) codifies the common-law rule making a carrier liable, without proof of negligence, for all damage to the goods transported by it, unless it affirmatively shows that the damage was occasioned by the shipper, act of God, the public enemy, public authority or the inherent vice or nature of the commodity. *Secretary of Agriculture v. United States*, 350 U.S. 162, 165.

2. The bill of lading contract provides that the carrier or party in possession of any of the property therein described shall be liable as at common law for any loss thereof or damage thereto, unless the damage is caused by the act of God, act or default of the shipper, natural shrinkage or except in case of negligence, for damage resulting from a defect or vice in the property (R. 158). Petitioner's argument cannot be reconciled with the terms of the bill of lading. Such terms and conditions must be either overruled or ignored. The contract provides that

carrier shall be liable as at common law with certain exceptions, whereas petitioner claims that carrier is not liable for any damage unless it is negligent.

3. Rules 130 and 135 of the Perishable Protective Tariff, No. 17, set out in the lower court's opinion, merely elaborate on the exception for damage resulting from a default or vice in the property (Rule 130) and the exception for damage caused by the act or default of the shipper (Rule 135) (R. 240-241). They do not, by their terms or intent, modify the applicable common law rule. If, however, these rules are construed to limit the common law liability of the carrier, they are unlawful and void under the clear wording of the Interstate Commerce Act.

4. Some of the reasons why the law, in pursuance of a wise policy, places the burden upon the carrier to prove the damage was occasioned by a cause for which it is not liable are discussed in a number of the earlier cases including *Schnell v. The Vallescura*, 293 U.S. 296, 304 (1934). Despite petitioner's argument to the contrary, it is the only rule which will operate with any degree of fairness whatsoever to the shipper. It is inconceivable that the Congress of the United States, in enacting the Carmack Amendment, and the courts in interpreting same, intended that a shipper be at the complete mercy of the carrier.

As applicable today as it was when written, is the statement of the reason for the rule in 4 R. C. L. Sec. 176, as follows:

> "The carrier's exclusive possession of evidence, the difficulties under which the bailor might labor in discovering and proving the carrier's fault, his inability to contradict the carrier's witnesses, the necessity of

avoiding the investigation of circumstances impossible to be unraveled, the importance of stimulating the care and fidelity of the carrier, and the convenience of a simple, intelligible, and uniform rule in so extensive a business, in other words, commercial necessity plus public policy and convenience, constitute much broader grounds and are the basis for the acceptance of the rule at the present time.

"In its application there is less of hardship than has sometimes been supposed; for while the law holds the carrier to an extraordinary degree of diligence, and treats him as an insurer of the property, it allows him, like other insurers, to demand a premium proportioned to the hazards of his employment. At all events, such severity as may inhere in the rule seems necessary to the security of property, and the protection of commerce; it is founded on a great principle of public policy; has been approved by many generations of wise men; and if the courts were now at liberty to make instead of declaring the law, it may well be questioned whether they could devise a system which on the whole would operate more beneficially."

ARGUMENT

A. THE INTERSTATE COMMERCE ACT, 49 U.S.C. Sec. 20(11), CODIFYING AND STRENGTHENING THE COMMON LAW, IMPOSES UPON THE CARRIER LIABILITY FOR THE "FULL ACTUAL" DAMAGE TO THE PROPERTY SHIPPED UNLESS THE CARRIER PROVES ONE OF THE SPECIFIC CAUSES RELIEVING IT OF RESPONSIBILITY.

In a recent case before the Supreme Court the parties conceded the above was a correct statement of the law applicable to perishable shipments. *Secretary of Agri-*

culture v. The United States, 350 U.S. 162, 165, fn. 9, (1956). Petitioner apparently admits that, except in the case of loss arising from injury to livestock in transit, no distinction was made at common law on the basis of its nature or character as perishable or nonperishable (Pet. Br. 12). It is petitioner's theory that a carrier is exempt from liability for damages to a perishable shipment upon showing freedom from negligence because of the evolution in recent years of a new rule (Pet. Br. 12).[11]

Petitioner has cited a number of cases decided by various state courts which in general follow the rule announced in *Southern Pac. Co. v. Itule*, 51 Ariz. 25, 74 P. 2d 38 (1937) (Pet. Br. 13). There are probably as many or more state court decisions which hold that a carrier in order to exonerate itself must prove the damage was occasioned by an excepted cause. 53 A.L.R. 990, 996-1019; 115 A.L.R. 1274-1280.

Probably the leading case on the point under consideration is *Schnell v. The Vallescura*, 293 U.S. 296 (1934). It is not enough to distinguish the decision by stating that the carrier was found to have been negligent. So far as respondent has been able to determine, this Court has never made any distinction of carrier liability on the basis of the commodity being perishable or nonperishable, but on the contrary, the insurer rule has been applied, in

[11] I.C.C. 34, Perishable Protective Tariff 17, Item 25880, (Feb. 1957) defines perishable freight as "any commodity which is susceptible to deterioration or decay, and/or which may be protected by refrigeration, icing, ventilation or against cold, **including.**" (Emphasis added). The tariff then lists approximately 150 various items. It is interesting to note that under the tariff such commodities as chestnuts; eggs; canned fruits; molasses; paper, building or wrapping, waxed, and/or asphalted, as well as tallow are perishable commodities.

addition to onions, to apples, molasses and most recently, eggs. *Chicago & N.W. R. Co. v. Whitnack Produce Co.*, 258 U.S. 369 (1922); *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 108-109 (1941); *Secretary of Agriculture v. United States*, 350 U.S. 162 (1956). The rule has been held to apply to a shipment of live poultry. *Chicago & E. T. R. Co. v. Collins Produce Co.*, 249 U.S. 186, 191-193 (1919). See also *Commodity Credit Corp. v. Norton*, 167 F.2d 161 (3rd Cir.) (1948); *California Packing Corp. v. The Empire State*, 180 F. Supp. 19 (N.D. Cal. 1960); *Compania DeVapores Insco, S. A. v. Missouri Pacific R. Co.*, 232 F.2d 657 (5th Cir.) (1956); *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396 (2nd Cir.) (1927); *Reider v. Thompson*, 116 F.Supp. 279 (E. D. La. 1953); *United States v. Mississippi Valley Barge Line Co.*, 285 F.2d 381 (8th Cir.) (1960); *Louisiana Southern Ry. Co. v. Anderson, Clayton & Co.*, 191 F.2d 784 (5th Cir.) (1951).

Petitioner's brief contains a quote from *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913) (Pet. Br. 11). If there was ever any doubt over the meaning of this decision, it was clearly resolved by the Court in *Cincinnati, N. & T. P. R. Co. v. Rankin*, 241 U.S. 319 (1916). The Cummins Amendment to Section 20(11) of 1915, among other things, declared any limitation of liability to be unlawful and void with certain exceptions. In *Secretary of Agriculture v. United States*, supra, this amendment was discussed in the brief for the United States and the Department of Agriculture.[12]

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[12] The following quotation appears in the brief for the United States and the Secretary of Agriculture (p. 22 n. 6):

"Senator Cummins pointed out that this amendment was designed, not to narrow the common law measure of liability, but

The case of *Austin v. Seaboard Air Line R. Co.*, 188 F.2d 239 (5th Cir. 1951) is cited by petitioner. This suit was brought for damages to a shipment of Christmas trees. The evidence showed that the trees had been cut and left on a siding for some time prior to their loading and that due to heavy rains they had become so wet and heavy that plaintiff had requested the carrier to make some allowance on the freight for such additional weight. The Court found from the evidence that the trees were loaded in a wet

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only "to get rid of that part of the common law" which permitted "limitation upon the amount of recovery." 51 Cong. Rec. 9625; and see id. at 9778-9. The exact meaning of the statutory reference to damage "caused by" the carrier evoked discussion on the Senate floor, with some Senators expressing fear that the term could be understood to change the "standard of liability by the common carrier of freight" which should "remain that of an insurer" (51 Cong. Rec. 9625, 9780). It was proposed to change "caused" to "transported" in order to remove this possibility, a proposal viewed favorably by Senator Cummins (id. at 9625). However, discussion of this change revealed that it might increase the liability of the carrier beyond that of the common law (ibid.), and that "caused by" had been interpreted in the Croninger case and others to impose precisely the common law standards sought to be retained (id. at 9778-80). The proposal was withdrawn on this understanding and the original language of the Carmack Amendment re-adopted (id. at 9779-80).

Clearly recognizing that the phrase "caused by" did not limit the carrier's liability to cases of negligence, but covered liability without fault except where the specific excuses of the common law could be established, the Cummins Amendment permitted the carrier to require notice and filing of claim for losses where it was without fault but forbade such a requirement as a condition of recovery where the loss resulted from the carrier's negligence. See **Barrett v. Van Pelt**, 268 U.S. 85, 89-90; **C. & O. Ry. Co. v. Thompson Mfg. Co.**, 270 U.S. 416, 422. The proviso forbidding the notice requirement in cases of negligence was repealed in 1930 (46 Stat. 251), but the repeal does not diminish the significance of the original provision in its demonstration of the scope of the liability under Section 20 (11)."

condition; that their damp condition when loaded, combined with the gradual increase in temperature while the shipment was en route, caused the damaged condition of the trees and that the injury was not caused by the carrier, but that all reasonable care and diligence had been exercised by the carriers in the transportation of the shipment. The case merely holds that the carrier sustained its burden of proving that the damage was due to an excepted cause and that it was guilty of no breach of contract contributing to such damage.

Hamilton Foods v. Atchison, Topeka & Santa Fe Ry. Co., 83 F. Supp. 478 (S. D. Cal. 1948), cited by petitioner, was affirmed in 173 F.2d 573 (9th Cir. 1949). In affirming the Court stated only that they found no reversible error in the lower Court's opinion. Certain language of the lower Court is not, at least to respondent, entirely clear. Apparently, one thousand cases of shrimp were shipped and 550 of them arrived in good condition at Los Angeles. The shipper trucked 410 of the remaining 450 cases from Los Angeles to San Francisco in a refrigerator truck belonging to shipper. Upon arrival in San Francisco these cases were found to be in a damaged condition and the Court held that such damage was due to fault of shipper in opening the car at Los Angeles and trucking the shrimp to San Francisco. As to the remaining 40 cases, the Court awarded plaintiff a judgment for their value.

In its decision in the instant case, the Supreme Court of Texas refused to follow the *Itule* case (R. 243) and distinguished *Atlantic Coast Line R. Co. v. Georgia Packing Co.*, 164 F.2d 1 (5th Cir. 1947); *Delphi Frosted Foods Corp. v. Illinois Cent. R. R.*, 89 F.Supp. 55 (W.D. Ky.

1950), aff'd, 188 F.2d 343 (6th Cir. 1951), cert. denied, 342 U.S. 833 (1951) and *Trautmann Bros. Co. v. Missouri Pac. R. R.*, 312 F.2d 102 (5th Cir. 1962) (R. 241-242).

That the Supreme Court of Texas properly construed the opinion of the Fifth Circuit in the *Trautmann Bros.* case is further evidenced by recent decisions of that court which hold the rule to be exactly as contended by respondent. In *Thompson v. James McCarrick Co., Inc.*, 205 F.2d 897 (5th Cir. 1953) the Court on p. 900 stated:

> "In an action brought under the Carmack Amendment, 49 U.S.C.A. Sec. 20(11), all the shipper and holder of a bill of lading is required to do to establish a 'prima facie' case is to show delivery in good condition, arrival in damaged condition, and the amount of his damages, whereupon the burden shifts to the carriet to show the cause of damage and that it is not liable therefor."

See also *Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry. Co.*, 263 F.2d 791 (5th Cir. 1959), cert. denied, 361 U.S. 827, and *Southern-Plaza Express v. Harville*, 233 F. 2d 264 (5th Cir. 1956).

The opinion of House of Lords, *F. O. Bradley & Sons Limited v. Federal Steam Navigation Co. Ltd.* appearing in Petition for Writ of Certiorari, Appendix p. 38a, is readily distinguishable. The Court held that the evidence showed that the apples were not fit to make the voyage in an ordinary way and, therefore, the damage was well within the words "resulting from . . . inherent quality or vice."

(Pet. for Cert. 39a).[13] It is difficult to understand the relevance of citing a case where the court has found upon the evidence that the defense of inherent vice was established in a case where a jury has affirmatively found to the contrary.

This brings us to the decision of the Court in *Larry's Sandwiches, Inc. v. Pacific Elec. Ry.*, 318 F. 2d 690 (9th Cir. 1963). This opinion is wrong. It is in conflict with all of the Federal Court cases heretofore cited. It is the one Federal Court case which states the rule exactly as petitioner contends it to be. While the Court cites *Secretary of Agriculture v. U. S.*, *supra*, it disregards this Court's holding in that case.

As authority for its holding that the carrier need only prove its own compliance with the tariff and the shipper's instructions, the Court cites Rule 130 and Rule 135 of the Perishable Protective Tariff and four cases. These cases are *U. S. v. Reading Co.*, 289 F. 2d 7 (3rd Cir. 1961); *Illinois Packing Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 236 F. 2d 908 (7th Cir. 1956); *Delphi Frosted Foods Corp. v. Illinois Central R. Co.*, 188 F. 2d 343 (6th Cir. 1961) and *Chesapeake & O. R. Co. v. Thompson Mfg.*

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[13] Petitioner in its discussion of this case says:

> "As the Court put it, it was enough that the apples 'decayed not because of the ship or of the route, but because they were apples . . .'" (Pet. Br. 19).

The Court held that the damage was caused not because of the ship or of the sea, or of the route, but because "they were apples **which were not fit to make the voyage in an ordinary way.**" (Pet. for Cert. 39a, 54a). (Emphasis added). Petitioner's omission in quoting from the case of the above emphasized words distorts completely the holding in the case.

Co., 270 U. S. 416 (1926), none of which support the Court's conclusion.

In the Reading Company case three carloads of beef had arrived at destination and were being held for loading on a ship. The parties stipulated that if the carrier had a duty, under the applicable tariff provision, to ice the car during this waiting period, the shipper was entitled to recover, but not otherwise. The Court held that under the tariff the carrier did not have the duty to ice. *U. S. v. Reading Co.*, 184 F. Supp. 206 (E. D. Penn.). On appeal, the government argued that the stipulation it voluntarily had entered into was not binding and that the carrier should be held liable under the Carmack Amendment. The Third Circuit Court of Appeals refused to allow the plaintiff to escape the clear language of the stipulation holding that to do so would discourage litigants from entering into a stipulation for fear that one of them, when faced with an adverse decision, might attempt to repudiate it. The case has nothing to do with the point under consideration. Actually, the shipper could not have prevailed even had it not entered into the stipulation. The tariff, which was valid, obligated the plaintiff to ice the car while awaiting export. Since the damage occurred to the meat during this period by reason of plaintiff's failure to ice the car, the damage plainly fell under the "fault of shipper" exception.

The next case cited is that of *Illinois Packing Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, supra, brought to recover damages to a carload of frozen beef which plaintiff alleged had defrosted because of defendant's negligence. In this case the car was furnished by the shipper and not

by the carrier. The parties stipulated that at origin the meat was in a good and frozen condition, but that upon arrival at destination it was in a partially defrosted condition. Defendant contended that it was not liable because of fault of shipper in furnishing it a defective car and further introduced evidence purporting to show that plaintiff's instructions were complied with. The case was submitted to the jury and resulted in a verdict for the plaintiff upon which the court entered a judgment. On appeal the defendant carrier argued that since the evidence showed that the defrosting of the meat resulted from inadequacies in the car furnished by plaintiff and without any negligence on its part, it was entitled to a directed verdict. The Court held, however, that an issue of fact was presented to the jury and, therefore, the lower court had properly refused to direct a verdict for the defendant. The case was reversed only because the trial judge made an erroneous statement to the jury concerning some prior testimony of a witness. Neither this case nor the *Delphi Frosted Foods Corp.* case, supra, wherein shipper failed to establish that the fruit was in good condition at origin, support the decision in the *Larry's Sandwiches case.*

The only other case cited is *Chesapeake and O. R. Co. v. Thompson Mfg. Co.*, supra, 270 U. S. 416 (1926). The *Itule* case, the *Delphi Frosted Foods Corp.* case and the *Georgia Packing Co.* case, supra, also cite as authority the *Thompson Mfg. Co.* case. This case, holding as it does the law exactly as contended by respondent, is nevertheless for some reason apparently difficult for some courts to understand. At the time the bill of lading exempted the carrier from liability unless the shipper filed a claim for

damages within four months after delivery of the property. However, under the Cummins Amendment of 1915, the filing of a claim was not required as a condition precedent to recovery if the damage was due to the negligence of the common carrier.[14] Shipper did not file a written claim and the suit was brought more than four months after the shipment had been delivered.

No attempt was made by the shipper to prove any negligent conduct on the part of the carrier. A jury found that the damage was not due to the act of God, the public enemy, or the act of the shipper or the nature of the goods themselves. Shipper argued that this verdict of the jury established a conclusive presumption of carrier's negligence and, therefore, no notice of claim was necessary.

Correctly holding that if this were true the plain purpose of the amendment would be defeated, the Court said:

> "It is sometimes said that the basis of the carrier's liability for loss of goods or for their damage in transit is 'presumed negligence.' Hall v. Nashville & C. R. Co., 13 Wall. 367, 372, 20 L. Ed. 594, 596. But the so-called presumption is not a true presumption, since it cannot be rebutted, and the statement itself is only another way of stating the rule of substantive law that a carrier is liable for a failure to transport safely goods intrusted to its care, unless the loss or damage was due to one of the specified causes. See Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 189, 19 L.Ed.

[14] Since 1930 the bill of lading has required that as a condition precedent to recovery, claims must be filed within nine months. There is no provision requiring either that a notice of claim be filed or excusing the filing of a claim if carrier is negligent. See Sec. 2(b) of the bill of lading contract (R. 159-160)

909, 912; New York C. R. Co. v. Lockwood, 17 Wall. 357, 376, 21 L.Ed. 627, 639, 10 Am. Neg. Cas. 624; Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 181, 23 L.Ed. 872, 875.

We do not consider that the phrase 'carelessness or negligence' of the carrier, as used in the Cummins Amendment in exempting shippers from giving written notice of a claim for damage, has any reference to the conclusive 'presumption' to which we have referred. If such were the meaning of the statute, every case of carrier's liability for damage in transit would be a case of presumed negligence, and proof of written notice of claim for damage required by the bill of lading would always be dispensed with, and the plain purpose of the amendment would be defeated. We think that by the use of the words 'carelessness or negligence,' it was intended to relieve the shipper from the necessity of making written proof of claim when, and only when the damage was due to the carrier's actual negligent conduct, and that by carelessness or negligence is meant not a rule of liability without fault, but negligence in fact. See Barrett v. Van Pelt, supra.'

Still speaking of the negligence required to be proven to avoid the necessity for filing a claim, the Court stated that the shipper had the burden of proving the carrier negligent as one of the facts essential to recovery. This is a statement which is often quoted out of context in the cases.

On the point under consideration, the Court, on page 423, stated:

"The trial court properly submitted to the jury the question whether the damage was due to an act of God or the public enemy or to the inherent condi-

> tion of the stoves, *since upon the answer to it depended the liability of the carrier, provided the shipper was entitled, under the Cummins Amendment, to maintain suit without giving the stipulated notice.* But the court erroneously instructed the jury that if they found that the damage was not due to these causes, they might return a verdict for the respondent, thus, in effect, resolving the issue of negligence in favor of the respondent." (Emphasis added).

As previously pointed out, petitioner concedes that at common law the same rule was applicable to both perishable and nonperishable commodities. The Association of American Railroads, however, in its brief as amicus curiae, takes the novel position that proof by a carrier of freedom from negligence constituted a complete defense to a suit for damages to perishables at common law (A.A.R. Br. 4).

Both petitioner and the A.A.R. carefully avoid use of the word "damage" in describing the condition at destination. Petitioner refers throughout its brief to "spoilage and decay" whereas the A.A.R. apparently prefers use of the term "deterioration or decay." The argument that decay in a perishable commodity automatically places it within the inherent vice exception serves only to obscure the basic question under consideration. The honeydew melons were damaged to a much greater extent by light to dark brown discoloration than they were by decay (Pl. Ex. 5, R. 173). It is undoubtedly this damage that the A.A.R. refers to as deterioration and the petitioner as spoilage.

The argument that the arrival of a car of perishables in a spoiled condition automatically places it within the "inherent vice" exception cannot be reconciled with the

decision in *Larry's Sandwiches, Inc. v. Pacific Elec. Ry.*, 318 F. 2d 690 (9th Cir. 1963). Certainly it cannot be contended that the thawing out of a frozen commodity is an inherent vice. Assume a shipper orders the vents open on a car moving through freezing temperatures and the commodity arrives frozen and worthless. Would the damaged or spoiled condition be due to an inherent vice in the commodity or would not the carrier resort to the simple expediency of absolving itself from liability by showing that the damage occurred through fault of shipper.

B. UNDER THE TERMS AND CONDITIONS OF THE BILL OF LADING CONTRACT THE CARRIER ASSUMES LIABILITY FOR ALL DAMAGE UNLESS IT IS ABLE TO PROVE THAT THE DAMAGE FALLS WITHIN ONE OF THE EXCEPTIONS SPECIFIED THEREIN.

Subject to certain exceptions, a common carrier is absolutely liable under the common law for loss or injury to goods received for carriage. *Secretary of Agriculture v. United States*, supra, 13 C.J.S. Sec. 71, p. 131-136. Sec. 1 (b) of the bill of lading contract provides that the carrier shall not be liable for damage caused by the act or default of the shipper or for natural shrinkage. It further provides that except in case of negligence of the carrier, it shall not be liable for damage resulting from a defect or vice in the property. There are other exceptions, but these are the only ones relied upon by petitioner in this case (R. 5). For all other damage, carrier agrees in Sec. 1(a) that it shall be liable as at common law.

Petitioner, in effect, says that if a carrier shows it is not negligent, the carrier is not liable for any damage to the shipment. It is impossible to reconcile such contention with either the bill of lading contract or with petitioner's statement that the carrier remains liable for damage not arising out of the nature of the goods. Petitioner, as an example, states that the carrier would be liable for injury accompanied by breaking of the crates in which vegetables or fruits are shipped (Pet. Br. 15-16). We assume that petitioner would also agree that a carrier is liable for injury, such as bruising, even though the crate is not actually broken. In this case there is evidence that discoloration on honeydew melons results from bruised spots and slight abrasions (R. p. 80, 114, 152-153).

In other words, it is apparent under the terms and conditions of the bill of lading that unless carrier can first prove that the damage was due to one or more of the excepted causes, the manner in which the carrier handled the car is immaterial. Petitioner correctly states the bill of lading exempts the carrier, absent negligence, for loss arising from the inherent vice or nature of the goods (Pet. Br. p. 17). The identical bill of lading is used in the shipment of nonperishable commodities, and yet for damage to a nonperishable commodity resulting from inherent vice or nature of the goods, apparently petitioner concedes that the burden of proving that such was the cause would be on the carrier.

If petitioner is correct, what purpose would there be in having the exception for a defect or vice in the property? Why would a carrier allege or attempt to prove that the damage resulted from a defect or vice in the property?

There is no question but that if carrier is negligent it is liable regardless of the cause of the damage. If, on the other hand, it can absolve itself of all liability by showing freedom from negligence, why bother with testimony about a vice or defect.

In an attempt to avoid the plain language of the bill of lading contract, the A.A.R. states that the common law relieves a railroad of liability for the deterioration or decay of perishables where the services of the railroad have been performed without negligence (A.A.R. Br. 7-9). Even the cases cited do not support such statement. These cases are *Larry's Sandwiches, Inc. v. Pacific Electric Ry. Co.*, 318 F.2d 690 (9th Cir. 1963) and *Southern Pacific Company v. Itule*, 51 Ariz. 25; 74 Pac. 2d 38; 115 A.L.R. 1268 (1937).

In the *Larry's Sandwiches* case the Court recognized the common law insurer's obligation of a carrier unless the damage was due, among other things, to inherent vice in the absence of negligence. The Court then based its holding on Rules 130 and 135 of the tariff, stating that they established the tests of negligence.

In the *Itule* case, the Court stated that under the common law the carrier was an insurer of the safe transportation of goods entrusted to its care, unless the damage was due to one of the four specified causes. The Court went on to say that there was one apparent exception to this rule, and that was when the goods transported was livestock. Because the Court thought it to be the fairer and more logical rule, it applied the livestock rule to a carload of tomatoes and held that the carrier, having proven that it exercised reasonable care to prevent damage, satisfied the

requirements of the law in regard to the quantum of proof required to establish a defense to the action. The *Itule* case might be applicable had the honeydew melons moved under a livestock bill of lading.

In *Bills of Lading*, 52 I.C.C. 671 (1919), the Commission, upon its own motion, instituted an investigation into the general subject of the form and substance of the bills of lading. The liability of a common carrier under the common law was stated on page 679 of the opinion. After a full hearing, the Commission prescribed a bill of lading for use in the shipment of both inanimate perishable and nonperishable goods. The form prescribed is in use today and is the one under which the present shipment moved. A different form bill of lading for perishable products, as well as for coal, was considered (p. 688), but in the concluding portion of its opinion, the Commission on page 740, said:

> "As stated in an earlier part of this report, certain interests have advocated the prescribing of special forms of bills of lading for perishable products and for coal. We are not convinced, upon consideration of all the facts of record and the arguments made in advocacy of such bills, that they are essential. It is believed that the uniform bills, prescribed will be adequate to care for any peculiar requirements of such traffic.
>
> A uniform livestock contract will be prescribed in a supplemental report and order as soon as practicable after consideration of the record which has been more fully developed through the medium of a further hearing had with that purpose in view."

To this day, the Commission has not prescribed a different bill of lading for perishables.

C. THE INTERSTATE COMMERCE ACT PROHIBITS A CARRIER FROM LIMITING ITS LIABILITY BY TARIFF.

Respondent contends that Rule 130 and Rule 135 of the Perishable Protective Tariff, No. 17, merely elaborate on the exception for damage resulting from a default or vice in the property (Rule 130) and the exception for damage caused by the act or default of the shipper, (Rule 135) (R. 240-241) but that if they be interpreted as lessening carrier's liability, they are void under the express language of the act (49 U.S.C.A. 20 (11)). A tariff so filed "gains nothing from that fact." *Boston & M. R. Co. v. Piper*, 246 U.S. 439, 445 (1918).

The rules are cited by the Court in the *Larry's Sandwiches* case, supra, and since the same law and the same bill of lading applies to perishable and nonperishable shipments if there is authority or basis for the rule announced by the court, it must, of necessity, be derived from these rules.

The question in this case is essentially one of burden of proof. If Rule 130 and Rule 135 be construed as authority for petitioner's contention, and change the burden of proof, they would necessarily lessen the carrier's liability and consequently be void, for the rule is that questions of burden of proof relate to substantive rather than procedural rights. *Central Vermont Ry. v. White*, 238 U.S. 507 (1915); *The Malcolm Baxter, Jr.* 277 U.S. 323 (1928).

Petitioner has never, and does not now, make any contention that Uniform Freight Classification No. 4 (A.A.R. Br. 37-39) has any bearing on the question in this case. The bill of lading provided that petitioner would be liable as at common law with certain exceptions (R. 158), and

it is under this contract that the liability of the parties is to be determined. The case of *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411 (1959), cited on page 15 in the A.A.R. brief is not applicable except insofar as this Court reaffirms the rule that at common law a common carrier was liable, without proof of negligence, for all damage to the goods transported by it, unless it affirmatively showed the damage was due to an excepted cause. See footnote 6, page 417.

The Court in the *Larry's Sandwiches* case, supra, stated that Rules 130 and 135 established the test of negligence. The failure to recognize that the rules merely elaborate on the bill of lading exceptions undoubtedly accounts for much of the problem that some courts have with these rules. Petitioner cites *Perishable Freight Investigation*, 56 I.C.C. 449 (1920) which investigation resulted in the inclusion of the rules in the tariff. See page 483. Petitioner is correct in stating that it was proposed that the carriers furnishing protective services be absolved of all liability. Such proposal, incidentally, was made by the Director General of Railroads. The Commission naturally refused to permit any such tariff, recognizing that even if it did, the tariff would be void. The Commission on page 482 stated:

> "For this reason many of the declarations in the tariff which deal with this matter of liability state with approximate accuracy what we believe to be the law. But such declarations can have no controlling effect, for the carrier's liability for loss or damage is determined by the law. Nothing can be added to or subtracted from the law by limitations or definitions stated in the tariffs, and this was admitted by counsel for the Director General. There is the constant risk, therefore, if such declarations

> are included, of misstating the law and misleading the parties to no good purpose."

The Commission agreed that some warning to shippers that a carrier was not liable for the inherent tendency of perishable goods to deteriorate or decay, nor were carriers liable if the instructions given by the shipper for transportation were improper, might be desirable. 56 I.C.C. 449, 483.

Finally, in its summary of conclusions, on page 614, the Commission stated that the proposed tariff contained numerous provisions scattered through both the general and special rules, defining or seeking to limit the carrier's liability for loss or damage; that this liability is determined by the law, and cannot be changed by declarations or definitions stated in tariff. The Commission then said:

> "There is the constant risk, therefore, if such declarations are included, of misstating the law and misleading the parties to no good purpose. In general, it is our conclusion that such provisions should be eliminated, but we think it desirable that shippers should be warned that where they direct in some measure the extent or character of the service and damage results which may be ascribed to such directions, the carriers can not be held liable. A general statement of this character is suggested."

Petitioner apparently feels that any damage to perishables falls within the inherent vice exception (Pet. Br. 23). Petitioner says that the protective tariff would be unintelligible except against the background of a common law rule which exonerates carrier from liability for damage in the form of spoilage and decay where it can prove its free-

dom from negligence and its compliance with the shipper's instructions. Otherwise, according to petitioner, the carrier would be absolutely liable if protective services were not requested. (Pet. Br. 23). Petitioner fails to understand that in such a case the carrier would not be liable but its freedom from liability would be derived not from the inherent vice or defect exception, but from the fault of shipper in failing to request proper protective services. Presumably, a shipper could ship a car of spinach in the middle of summer loaded in a car without ice and instruct carrier to keep the vents closed. The car would undoubtedly arrive at destination some five or six days later overheated, cooked and worthless. Such condition is not the result of an inherent vice or defect, but the fault of shipper and carrier could easily prove that it was not liable for the ensuing damage.

D. IF A CARRIER FAILS TO PROVE THAT THE DAMAGE WAS DUE TO AN EXCEPTED CAUSE IT IS ONLY PROPER THAT IT BE CHARGED WITH THE LOSS.

There are many reasons, in addition to those previously mentioned, why it is only fair that the carrier should have to prove that the damage was due to a cause for which it is not liable. A contrary rule would make it impossible in a large majority of cases for a shipper to ever recover unless the carrier saw fit to admit that it was negligent. Under petitioner's theory, a shipper would, for the first time in the history of carrier law, be unable to recover damage for a loss occasioned by something other than act of God, fault of shipper or vice or defect in the property.

Petitioner does not even concede liability for breach of contract, contending, as it does, that there must be a negli-

gent breach. Vents on a car might be improperly closed and an employee of the carrier might make an honest mistake and note them open. For such a mistake the shipper and not the carrier would be the one who would bear the loss. The same would be true for damage occasioned by acts of third parties. Assume that a car of onions moving with the vents open is placed on a hold track awaiting transfer to a connecting carrier when an adjacent warehouse is set on fire by arsonists resulting in the onions becoming overheated and spoiled even though the railroad acted promptly in switching the car out of danger. Under petitioner's argument, the carrier, not being negligent in any particular, would be exempt from all liability.

What is the position of petitioner with regard to the absence of records by reason of their being lost, destroyed, or misplaced and with regard to proof concerning services which should properly be accorded the shipment but about which no record is made? A good example is the absence of a fan record in the case under consideration (R. 97)[15] At destination the fans were shown to be in an "on" position which is the only record of the position of the fans in the

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[15] Petitioner's expert witness, J. A. Friend, was, before he retired, Superintendent of Refrigerator Service of the American Refrigerator Transit Company (R. 85). For about thirty years he was a member of the National Perishable Freight Committee which organization publishes the Perishable Protective Tariff and makes recommendations for the rules on all perishable freight in the United States (R. 86). Mr. Friend testified:

> "Q. What is your record as to the running of the fans in each case?
>
> A. We do not record records on the operation of the fans because there is no tariff requirement that the operation of the fans be recorded. Our instructions are to operate these cars with fans on in all cases unless otherwise specified by the shipper."

entire case (P. Ex. P-5, R. 11, 172). The same exhibit shows that the temperature of the honeydew melons located in the top of the car was 46° F. whereas, the melons at the bottom of the car had a temperature of 40° F. The fans should properly have been on during the entire period of transportation as their purpose is to give better refrigeration and more uniform distribution of air through the car (R. 97)[16]. According to petitioners expert, prior to the installation of fans on refrigerator cars, it was not uncommon for the top and the bottom temperature to vary as much as 6 to 8 degrees but with fans you come very close to having an even temperature at the top and bottom (R. 97-98). With fans, if there is a difference in temperature, the produce at the top of the load is cooler than at the bottom (R. 98). In sum, from the evidence presented by the carrier, it would appear that if the carriers had had a fan record, it would have reflected an error.

Ordinarily the original record of the service accorded a car is prepared by the employee whose duty it is to perform such service. As a result, shipper's cause of action would in a large number of instances depend solely upon a railroad employee turning in a written record acknowledging that he had improperly performed his duty. The Interstate Commerce Act made it possible for a shipper to treat the originating or the delivering carrier as though it had handled the shipment from origin to destination. The legal effect of this provision was not to confer upon a shipper any new kind of contractual right, but to extend to him rather a new and additional kind of remedy for the enforcement of his pre-existing contractual rights. To pro-

[16] See also Protection of Rail Shipments of Fruits and Vegetables, Agriculture Handbook No. 195, p. 40-41 (July 1961).

tect the initial or the delivering carrier it was necessary that 49 U.S.C. Sec. 20 (12) be enacted. This act permits the charging of the entire loss to the carrier on whose line the damage was sustained. When none of the carriers admit to any fault the amount paid is prorated on a mileage basis. Assuming the majority of carriers to be willing to pay for their own mistakes, they are reluctant to pay the entire loss if they feel a connecting carrier's records are of questionable accuracy. The rule of strict accountability is therefore even more necessary today than it was at common law.

It has been argued that carrier's records are entitled to greater credibility because falsification of same is made a crime punishable by fine and imprisonment. Most, if not all, refrigerator cars are owned by separate companies who supply the cars to the carriers and furnish all of the protective services requested by the shipper (R. 85). It has been held that such a company cannot be criminally liable under the Interstate Commerce Act for failure to truly keep or for falsifying icing records. *United States of America v. Fruit Grower's Express Company*, 279 U.S. 363 (1929).

What has been said deal with the reasons for the rule by virtue of the car being in the exclusive possession of the carrier. The A.A.R. argues that proof by the carrier of freedom from negligence should exonerate the carrier because the shipper is peculiarly knowledgeable of the commodity's condition at and prior to the time of shipment (A.A.R. Br. 27-28). Petitioner states that the shipper can establish a prima facie case of liability, as he did here, simply by showing that the fruit was in good condition at the time of shipment, but spoiled upon arrival (Pet. Br.

16). The error in such argument lies in the fact that there is nothing at all simple about proving delivery to the carrier in good condition.

A shipper is forced to rely on carrier's records in order to determine how a car was handled, whereas, contrary to the argument of petitioner, the condition of the commodity at origin is by no means in the exclusive possession of the shipper. Actually, there is very little, if any, evidence pertaining to the condition of the shipment which is not available to the carrier and in many respects the carrier is in a better position than shipper to determine the carrying quality of a commodity.

The Western Weighing & Inspection Bureau[17] is an agency of the carriers (R. 147). Its district inspector resides in the Rio Grande Valley of Texas. In the course of his business, he examines fruits and vegatables loaded in railroad cars for the purpose of determining their quality and condition and has inspected probably thousands of cars of honeydew melons and peppers and, in addition, has made a study of field conditions and growing conditions of fruits and vegetables in the Rio Grande Valley (R. 137-138). He, or inspectors working under him, have, of course, the right to inspect at origin every car that is shipped. Information about the weather and climatic conditions are readily available. Since each season the harvest of each commodity results in the movement of a number of cars by numerous shippers, the railroad is in possession of records and destination inspections of all of the cars shipped and can study their outturn to determine if there

[17] The Western Weighing & Inspection Bureau is erroneously referred to throughout the record as the Western Wing & Inspection Bureau.

were any general field defects, whereas shipper is generally limited to the cars which he personally handles. Also, the railroad maintains an agent who issues shipper a bill of lading. While such agent may not be a pathologist, since the crates as well as every melon in the crates are visible, it would hardly require an expert to note if 18% of the honeydews were discolored and decayed and if so, certainly the agent would not have issued a bill of lading acknowledging their receipt in apparent good order.

Petitioner states that in the case of loss not arising out of the nature of the goods the rule remains that the carrier cannot escape liability by proving its freedom from fault (Pet. Br. 15-16). Evidently, damage occasioned by the thawing of a frozen shipment is considered by petitioner to be a loss arising out of the nature of the goods. Petitioner says that "injury accompanied by breaking of the crates in which the vegetables or fruits are shipped" is an example of a loss not arising out of the nature of the goods. The case of *Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry.*, 263 F.2d 791, 794 (5th Cir.), cert. denied, 361 U.S. 827 (1959) is cited in support of this statement. In the first place there is no significance to the term "accompanied by breaking of the crates". No claim is made for damage to the crate itself. Crates can be and are repaired. The melons can become bruised, cut or cracked without necessarily damaging the crate and it is for this damage that a claim is made. Petitioner states that the *Yeckes-Eichenbaum* opinion clearly demonstrates the distinction between breakage and spoilage cases. What is the distinction between breakage and spoilage cases that is made in this opinion? The district court opinion in the *Yeckes-Eichenbaum* case is reported in 165 F. Supp. 204. On p. 205 the Court says:

> "Upon arrival at Eastern destinations crate breakage was noted in each of the cars which had caused damage to the cantaloupes. Plaintiff's sue for this damage caused by the breakage."

On appeal, supra, the Fifth Circuit stated that damage resulting from breakage to crates was a matter entirely different from spoilage due to inherent vice. The Court did not say any different rules would apply. Apparently the Court was attempting to distinguish *Texas & P. Ry. Co. v. Empacadora de Ciudad Juarez*, S.A., 309 S.W.2d 926 Ct. Civ. App. Tex. (1957) which case was overruled by the Supreme Court of Texas in its decision in the instant case

In *Trautmann Bros. Co. v. Missouri Pacific Railroad Co.*, 312 F.2d 102 (5th Cir. 1962), the Court on page 104 says that a common carrier is not absolutely liable for spoilage or physical deterioration during the course of shipment. Following this statement, in a footnote, the Court has this to say:

> "There is an obvious distinction between damage of that type and damage resulting from crate breakage or physical breakage."

In support of this statement the Court cites the *Yeckes-Eichenbaum* case, but does not further enlighten us as to what the "obvious distinction" is.

Finally, if the carrier can completely exonerate itself by merely stating that according to its records there is no negligence the shipper would even be deprived of his day in Court. Presumably, if such were the rule a shipper in addition to pleading a delivery in good and an arrival in bad condi-

tion, would have to at least alternatively, allege specific acts of negligence on the part of the carrier. It would be an impossibility in all of the so-called "clear record" cases to either allege or prove specific acts of negligence. If a shipper had two cars containing identical commodities, which arrived at destination with one showing damage and the other in good condition, a shipper might testify that in his opinion the vents on the damaged car were not properly manipulated or the icing instructions were not complied with or the car itself was defective or that it might be a combination of these things, but of necessity his testimony would be so speculative as to undoubtedly render it inadmissible and entitle the carrier to an instructed verdict.

CONCLUSION

For the reasons stated, the judgment of the Texas Supreme Court should be affirmed.

Respectfully submitted,

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